88-906

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

DOROTHY ZOSKY,

Petitioner

versus

DANIEL BOYER and BOENNING
AND SCATTERGOOD,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Richard J. Orloski,
Counsel for Petitioner
ORLOSKI & HINGA
1005 S. Cedar Crest Blvd.
Allentown, Pa 18103
(215) 433-2363

QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN DISMISSING PETITIONER'S APPEAL FOR LACK OF APPELLATE JURISDICTION WHERE WELL-ESTABLISHED CASE LAW IN Gulfstream Aerospace Corp. v. Mayacamas Corp., 56 U.S. L.W. 4243, (March 22, 1988) AND THE THIRD CIRCUIT PROVIDES THAT THE ORDER COMPELLING CONTRACT ARBITRATION WHICH PETITIONER APPEALED FROM IS APPEALABLE AS "FINAL DECISION" WITHIN THE MEANING OF 28 U.S.C. SECTION 1291; THE ORDER IS IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE OF 28 U.S.C. SECTION 1291 AND UNDER 28 U.S.C. SECTION 1292(a)(1)?

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IN THE

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NO.

DOROTHY ZOSKY,

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versus

DANIEL BOYER and BOENNING & SCATTERGOOD,

Respondents

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Dorothy Zosky, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered September 30, 1988 is unrecorded and appears at page 22 of Appendix herein.

The Order of the United States Court of Appeals for the Third Circuit rendered September 8, 1988 is recorded at ___F.2d ____ (3d Cir, 1988), and appears at page 23 of Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered December 1, 1987 is unrecorded and appears at page 58 of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered September 4, 1987 is unrecorded and appears at page 59 of Appendix herein.

The Final Order of the Court of Appeals for the Third Circuit was dated September

30, 1988. This Petition For Writ of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Court rests upon 28 U.S.C. Section 1241 (1) and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

28 U.S.C. Section 1291 at Appendix page 60.

28 U.S.C. Section 1292(a)(1) at Appendix page 61.

STATEMENT OF THE CASE

Petitioner, a casual investor, filed her Complaint against Respondents, a brokerage firm and its employee, on or about March 31, 1986. Petitioner seeks damages for various violations of the Securities Act of 1933, the Securities Exchange Act of 1934 and state law. Respondents' Answer was filed on or about May 23, 1986. Respondents initially raised in their Answer the claim that the dispute was arbitratable, but for strategy reasons, Respondents never pursued the claim.

Thereafter, exhaustive discovery ensued. The parties prepared for and participated in a Federal arbitration on October 21, 1986 where Respondents prevailed.

Petitioner filed a timely Demand For Jury Trial De Novo, the parties prepared a Pre-Trial Order duly signed by the Honorable Daniel H. Huyett, 3d, United States District Court for the Eastern District of Pennsylvania, and the parties

consented to have this matter tried by a jury.

Respondents filed a Motion For Partial Summary Judgment on May 8, 1987. This matter was listed for jury trial September 15, 1987 and continued to September 22, 1987.

Respondents then filed a Motion to Compel Arbitration on July 24, 1987. On September 4, 1987, the District Court denied Respondents' Motion To Compel. Respondents duly appealed the denial of their Motion to Compel to the United States District Court For the Eastern District of PA. On November 5, 1987, Respondents filed with said District Court a Praecipe to Withdraw said appeal. On November 17, 1987, the District Court dismissed Respondents' appeal. On November 25, 1987, Respondents filed a belated Motion For Reconsideration of the District Court's Order of September 4, 1987 in which the Court denied Defendants' Motion to Compel Arbitration. On December 1, 1987, the District Court reversed its prior order

and granted Respondents' Motion To Compel Arbitration. Petitioner filed a timely appeal of the District Court's second Order compelling arbitration.

On September 30, 1988, the United States Court of Appeals for the Third Circuit dismissed Petitioner's appeal for lack of appellate jurisdiction. On September 30, 1988, the Third Circuit denied Petitioner's timely Petition for Rehearing in accordance with Rule 40 of the Federal Rules of Appellate Procedure.

Petitioner respectfully seeks review of the appellate order denying rehearing. Her Petition for Writ of Certiorari is now before this Honorable Court for disposition.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 1711(a) of the Rules of the United States Supreme Court in that a federal court of appeals has rendered a decision in conflict with the decision of another Federal court of appeals on the same matter as to call for an exercise of this Court's power of supervision.

ARGUMENT

I. WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN DISMISSING PETITIONER'S APPEAL FOR LACK OF APPELLATE JURISDICTION WHERE WELL-ESTABLISHED CASE LAW IN Gulfstream Aerospace Corp. v. Mayacamas Corp., 56 U.S.L.W. 4243, (March 22, 1988) AND THE THIRD CIRCUIT PROVIDES THAT THE ORDER COMPELLING CONTRACT ARBITRATION WHICH PETITIONER APPEALED FROM IS APPEALABLE AS "FINAL DECISION" WITHIN THE MEANING OF 28 U.S.C. SECTION 1291; THE ORDER IS IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE OF 28 U.S.C. SECTION 1291; AND UNDER 28 U.S.C. SECTION 1292(a)(1)?

1. The well-established case law in the Third Circuit Court of Appeals provides that the Order in this case is a "final decision" within the meaning of Section 1291. Gavlik v. H.F. Campbell, Co., 526 F.2d 777 (3d Cir, 1975). In Goodall-Sanford v. Textile Workers, 353 U.S. 550, 77 S.Ct. 920, 1 L.Ed.2d 1031 (1957), the United States Supreme Court held that an order directing arbitration in a suit brought under Section 301(a) of the Labor Management Relations Act of 1947, U.S.C. Section 1859 was appealable. The Court reasoned that "...[a]rbitration is not merely a step in judicial enforcement of a claim nor auxiliary to a main proceeding, but the full relief sought. A decree under section 301(a) ordering enforcement of an arbitration provision in a collective bargaining agreement is, therefore, a 'final decision' within the meaning of 28 U.S.C. Section 1291." Id. 353 U.S. at 551-552 77 S.Ct. at 921.

The Third Circuit Court of Appeals followed the Goodall-Sanford decision in Rogers v. Shering Corp., 262 F.2d 180, 182 (3d Cir. 1959), cert denied, 359 U.S. 991, 79 S.Ct. 1121, 3 L.Ed.2d 980 (1959) where that Circuit Court stated in a commercial arbitration context:

> "It is settled that any order for arbitration is a final appealable decision where it is not merely a step in the judicial enforcement of a claim nor auxiliary to a main proceeding but is the full relief sought."

The order compelling arbitration here, like the order compelling labor arbitration in Goodall-Sanford, supra, represents the full relief sought by Respondents in this case. The order compelling arbitration here is thus a "final decision" under 28 U.S.C. Section 1291. Gavlik, supra at 782.

In Rogers v. Shering Corp., supra, the Third Circuit Court of Appeals explained the rationale for allowing immediate appeal in cases such as the one at bar:

> "It would appear that the underlying rationale of the cases, although not often expressed in these terms, is that an order directing arbitration is interlocutory and, therefore, not appealable if it is made in a lawsuit, such as a suit for damages, in which in the normal course of judicial procedure, there will be a later final order or judgment for which an appeal can be taken by a person aggrieved by the prior order to arbitrate. If, however, the order to arbitrate will not, in the normal course of procedure, be followed by another judicial order which will be required to carry the arbitration award into effect, the order to arbitrate must be regarded as final if the right to review it on appeal is to be given."
>
> Id. at 182

The latter is the situation in this case on appeal. If the order compelling arbitration stands and the parties carry out an arbitration, the arbitration award will not require judicial approval or a court decree to put it into effect. The decision of the arbitrators will be binding. Therefore, unless Petitioner now has a right to appeal from the order compelling arbitration, she

will in all probability never be able to secure an appellate review of that order. See, Rogers v. Shering Corp., supra.

The district court order compelling arbitration is a final appealable order because it was NOT made in a continuing suit which sought other relief against Respondents Boenning & Scattergood. The order put Petitioner "effectively out of court." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 74 L.Ed.2d 765, 103 S.Ct. 927 (1983).

2. The Gulfstream Aerospace Corp. v. Mayacames Corp., 108 S.Ct. 11, 33 (1988), decision does not address and thus in no way alters the appealability of "final decisions" under Section 1291. No grounds exist to alter clearly established legal precedents on this issue.

In Gulfstream, supra, a California corporation refused to make payments on an aircraft it contracted to purchase from a

Georgia corporation. The Georgia corporation filed suit in Georgia State Court for breach of contract. The California corporation then filed suit in Federal Court in California for breach of the same contract. The Georgia corporation moved for a stay or dismissal of the Federal action because of the pendency of a similar litigation in State court. The District Court denied the Georgia corporation's motion.

The Court of Appeals dismissed the appeal. Affirming the dismissal of the appeal, the United States Supreme Court held that a Federal District Court order denying a motion to stay or dismiss an action because of a similar state court suit is not immediately appealable as a collateral order under 28 U.S.C. Section 1292(a)(1). (emphasis added).

a. In Gulfstream, the United States Supreme Court did not address and clearly did not alter the definition of final decision for Section 1291 analysis. In

Gulfstream, the United States Supreme Court repeated the general rule that a district court order is appealable under Section 1291 only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment". (citations omitted). Gulfstream at 99 L.Ed.2d 304.

The order in Gulfstream had no such effect. Indeed, that order refusing to stay or dismiss because of similar state court suit, ensured that litigation would continue in district court. Id. Accordingly, the Supreme Court automatically rejected that Petitioner's obviously frivolous contention that that order constituted a "final decision" under Section 1291. Thus, the Gulfstream decision provides no such support for altering well-established case law or underlying rationale in the Third Circuit regarding the definition of "final decision" under Section 1291.

The case at bar is legally and factually distinct from Gulfstream.

b. The facts here differ significantly from those in Gulfstream. The order here is tantamount to dismissal of Petitioner's Federal court action. Unlike the order in Gulfstream which ensured the litigation would continue in Federal court, the order in this case ousts Petitioner from the Federal forum. As a result of the district court order, Petitioner is forced to be subjected to binding arbitration, with an arbitration award which will be effective without further court action.

Thus, as previously determined by the Third Circuit, the order here "represents the 'full relief' sought by respondents." Once the parties are directed to arbitration, judicial involvement in this controversy for all practical purposes ends, as it is the arbitrator who then resolves all matters in dispute. Hence, the arbitration order in this case being neither a

step in the judicial enforcement of the disputed claims, nor auxiliary to any main proceeding is a final decision over which this Honorable Court has jurisdiction pursuant to 28 U.S.C. Section 1291. Gavlik, supra at 782.

The Court of Appeals thus disregarded clear precedent supporting appellate jurisdiction of the order at bar, and wrongfully extended the Gulfstream decision to cover the case at bar.

c. The legal issue here differs significantly from the legal issue in Gulfstream. The Supreme Court in Gulfstream first addressed the appealability of the order before it pursuant to the collateral order exception of Section 1291. The order failed to meet the initial requirement of the collateral order exception (i.e., that the order conclusively determines the disputed question). Therefore, the order was not appealable under the collateral order exception. See, Gulfstream at pp. 304-306.

Next, the Supreme Court addressed the appealability of the order pursuant to Section 1292(a)(1). That section gives court of appeals jurisdiction over appeals from interlocutory orders granting or denying injunctions. 28 U.S.C. Section 1292(a)(1). Over time, the judicially created Enelow-Ettelson doctrine extended Section 1291(a)(1) jurisdiction to orders that stayed or refused to stay judicial proceedings, other than injunction related.

The Enelow-Ettelson doctrine thus extended Section 1292(a)(1) jurisdiction to orders which, by analogy, were similar to injunctions. The Supreme Court refused to continue to analyze Section 1292(a)(1) cases under the Enelow-Ettelson rule which, based upon "outmoded procedural differentiations," is "deficient in utility and sense." Gulfstream at 308.

The Supreme Court stated: "that the Enelow-Ettelson doctrine is divorced from any rational or coherent appeals policy.

(citations omitted). Under the rule, appellate jurisdiction over orders granting or denying stays depends upon a set of considerations that in no way reflects or relates to the need for interlocutory review." Gulfstream at 310.

Accordingly, the Supreme Court overturned cases establishing the Enelow-Ettelson rule and held "that orders granting or denying stays of 'legal' proceedings on 'equitable' grounds are not automatically appealable under Section 1292(a)(1). Gulfstream at 312.

The Supreme Court specifically pointed out that its holding will not prevent interlocutory review of district court orders when such review is truly needed. Gulfstream at 312. The Supreme Court added that other bases of appellate jurisdiction remain available. Id.

Absent from the Supreme Court's Gulfstream opinion is hold, language, or reasoning which affects the definition of "final decision" as set forth in Section 1291.

Nevertheless, this Third Circuit Court of Appeals seized upon the Gulfstream decision as an opportunity to review, reinterpret and discard well-established law in the Third Circuit pertaining to appellate jurisdiction under Section 1291.

Specifically, in its Opinion in this case, the Circuit Court re-interpreted Rogers v. Shering Corp. 262 F.2d 180 (3d Cir), cert denied, 359 U.S. 99 (1959), and concluded that the Rogers court could have relied upon the procedural doctrine of the underlying litigation to uphold appellate jurisdiction in that case. (Appendix page 44). The Opinion proceeded to hold that, based upon its new interpretation of Rogers, Gavlik, is no longer

viable precedent.[1] Order and Opinion of September 8, 1988, p. 14. (Appendix, page 24).

The proposed rule which focuses on procedural distinctions will produce arbitrary and anomalous results such as those results produced by the Enelow-Ettelson rule and lambasted by the Supreme Court. See, e.g., Gulfstream at 310-311.

In the end, without controlling authority,

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[1]The Opinion proposed an "anomalous" rule of appealability of what amounts to the same order to depend on the procedural posture of the case in the district court. Opinion and Order of September 8, 1988 at p. 14, Appendix, page .

Federal Court of Appeals decided that it would not follow the holding or the rationale of the Gavlik decision. Instead, it found that Petitioner's order, which effectiveness put her out of Federal Court, was not appealable. To hold that the order in this case is not a final decision under Section 1291 required reversal of Rogers v. Shering Corp., supra; Gavlik, supra; United Steelworkers of America v. Canron, Inc., 580 F.2d 77 (3d Cir, 1980); Goodwin v. Elkins & Co., 730 F.2d 99 (3d Cir, 1984); Towers, Perrin, Forster & Crosby, Inc. v. Brown, 732 F.2d 345 (3d Cir, 1984); and numerous other Third Circuit and other circuit cases.

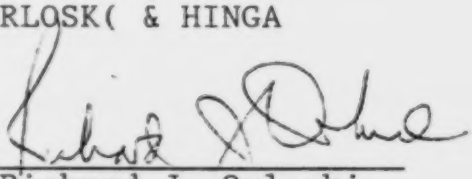
3. The Opinion dismissing Petitioner's appeal for lack of jurisdiction acknowledged that its holding in this case creates a conflict of case law within the Court of Appeals. Opinion, p. 12, 13, footnote 5 and p. 14 footnote 6. (Appendix, page 44,45).

Consideration of the full Third Circuit Court of Appeals was necessary to secure or maintain uniformity among Third Circuit decisions. However, the Court of Appeals denied Petitioner's Petition For Rehearing filed in accordance with Federal Rule of Appellate Procedure 35(a)(1). Therefore, Petitioner respectfully seeks a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Petition For Writ of Certiorari ought to be granted.

ORLOSK(& HINGA



Richard J. Orloski,
Attorney for
Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1782

DOROTHY ZOSKY,

Appellant

v.

DANIEL BOYER AND BOENNING & SCATTERGOOD,

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges.

The Petition for rehearing filed by Appellant, Dorothy Zosky, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

9/30/88

BY THE COURT:

/S/ Dolores K. Sloviter

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1782

ZOSKY, DOROTHY,
Appellant

vs.

BOYER, DANIEL AND BOENNING & SCATTERGOOD

(D.C. CIVIL NO. 86-1816)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, SLOVITER and HUTCHINSON
Circuit Judges

9/8/88

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel May 31, 1988.

On consideration of this appeal from the judgment of the said District Court entered December 1, 1987, it is hereby ordered and adjudged by this Court that the appeal be dismissed for lack of appellate jurisdiction. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court. ATTEST: Sally Mvros, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1782

DOROTHY ZOSKY,

Appellant

vs.

DANIEL BOYER AND BOENNING & SCATTERGOOD

On Appeal from the United States District Court For the Eastern District of Penna.
(D.C. Civil No. 86-1816)

Argued May 31, 1988

Before: SEITZ, SLOVITER, and HUTCHINSON, Circuit Judges.

(Opinion filed September 8, 1988)

Richard J. Orloski (Argued)
Orloski & Hinga
allentown, PA 18103

Attorney for Appellant

Jean C. Hemphill (Argued)
Monteverde, Hemphill, Maschmeyer & Obert
Philadelphia, PA 19109

Attorney for Appellees

OPINION OF THE COURT

SOLVITER, Circuit Judge

This appeal from a magistrate's order compelling the parties to arbitrate their securities dispute presents us with an important question of appellate jurisdiction.

I

FACTS

A brief account of the underlying events suffices for purposes of this appeal. Dorothy Zosky, an investor complaining of certain unsuccessful investments, filed this suit against Boenning and Scattergood, a regional securities brokerage firm which is a member of the National Association of Securities Dealers, and Daniel Boyer III, a registered broker employed by Boenning, alleging violations of the Securities Act of 1933, the Securities Exchange Act of 1934, and common law negligence. The Defendants' answer asserted, inter alia, that Plaintiff's claim was subject to an arbitration agreement

and that plaintiff must be compelled to proceed in that manner.[1] Zosky refused defendants' request that the dispute be submitted to arbitration. As defendants' counsel subsequently explained, she did not file a motion to enforce arbitration at that time in view of the status of the law in the Third Circuit on the subject of the arbitrability

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[1]One of the terms of the Customer Agreement signed by Zosky on April 4, 1983 provides: Except as may otherwise be provided by law, it is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the rules then obtaining of either the Philadelphia Stock Exchange or pursuant to the Code of Arbitration Procedure of the National Association of Securities, Dealers, Inc. as the undersigned may elect. Arbitration must be commenced by service upon the other of a written demand for arbitration or a written notice of intention to arbitrate, therein electing the arbitration tribunal. In the event the undersigned does not make such designation with five (5) days of such demand or notice, then the undersigned authorizes you to do so on behalf of the undersigned. Any arbitration hereunder shall be before at least three arbitrators, and the award of the arbitrators or a majority of them, shall be final. Judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

App. at 32.

of investor securities fraud complaints.[2]

Following a period of discovery[3], the parties agreed that the matter could be referred to a magistrate for trial Thereafter, the Supreme Court issued its opinion in Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332 (1987), holding that agreements to arbitrate disputes under the Securities Exchange Act are judicially enforceable. Because this court's contrary authority was no longer viable, see,

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[2]We note that defendants' counsel accurately described the status of this court's then prevailing precedent. See, e.g., Ayres v. Merrill Lynch, Pierce, Fenner & Smith, 538 F.2d 532, 536-37 (3d Cir,) cert denied, 429 U.S. 1010 (1976).

[3]Pursuant to the local rules in the Eastern District of Pennsylvania, the action was submitted to a court-appointed arbitration panel which entered an award for defendants on Oct. 24, 1986. As permitted by those rules, Zosky filed a demand for jury trial de novo. E.D. Pa. Local Rule 8; see, generally, Broderick, Compulsory Arbitration: One Better Way, 69 A.B.A.J. 64 (1983).

Jacobson v. Merrill, Lynch, Pierce, Fenner & Smith, Inc. , 797 F.2d 1197 (3d Cir, 1986), vacated, 107 S.Ct. 3204 (1987), defendants then filed a motion to compel arbitration. Although the magistrate originally denied the motion and defendants filed a notice of appeal, the magistrate allowed further argument and briefing. After defendants withdrew their pending appeal at his invitation, he entered the order granting defendants' motion to compel arbitration.

Zosky appeals, contending that the law of the case doctrine renders improper the magistrate's reversal of his original order after defendants had taken and subsequently withdrawn their appeal; that defendants waived their right to arbitrate; that the arbitration clause in the Customer Agreement did not constitute a binding contract; that the arbitration agreement did not cover the dispute with Boyer; and that one of the

relevant trades was not transacted through the customer account and was, therefore, not subject to the arbitration agreement.

II

DISCUSSION

We cannot reach the merits of this appeal unless we are satisfied of this court's jurisdiction, an issue we are obliged to consider sua sponte. The parties in their briefs asserted our jurisdiction under 28 U.S.C. §1292(a), citing our opinion in Gavlik Constr. Co. v. H. F. Campbell Co., 526 F.2d 777 (3d Cir, 1975), which in turn relied on, inter alia, the Enelow-Ettleson doctrine. See, Gavlik, 526 F.2d at 782. At the time the briefs were filed in this court, the Enelow Ettleson doctrine, under which certain orders staying or refusing to stay judicial proceedings were treated as appealable injunctions, was an accepted feature of the law of appellate jurisdiction, see, e.g., Osterneck v. Merrill Lynch, Pierce, Fenner

& Smith, 841 F.2d 508, 509-10 (3d Cir, 1988), although the doctrine was subject to unconcealed criticism, see, e.g., Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 734 (7th Cir, 1986), ("doctrine is arbitrary, mischievous, and devoid of contemporary utility"); H. C. Lawton, Jr., Inc. v. Truck Drivers, Chauffeurs and Helpers Local Union No. 384, 755 F.2d 324, 327 n.2 (3d Cir, 1985) ("rule...lack[s] a rational basis").

Before this matter was argued, however, the Supreme Court handed down its opinion in Gulfstream Aerospace Corp. v. Mayacamas Corp. 108 S.Ct. 1133 (1988), which held that a district court order denying a motion to stay or dismiss an action when a similar suit is pending in state court is not immediately appealable, and which expressly repudiated the Enelow-Ettleson doctrine as "deficient in utility and sense." Id. at 1140. We then requested the parties

to brief and argue the appealability issue. Our review reveals a somewhat inconsistent pattern in this court's treatment of the issue of appealability of arbitration orders.

A.

ARBITRATION ORDERS AND APPEALABILITY: PRIOR TREATMENT

The Federal Arbitration Act (the Act) 9 U.S.C. §§3-4, which was enacted in 1925 to eliminate the judicial rule that arbitration agreements were unenforceable in courts of admiralty and equity, see, The Anaconda v. American Sugar Refining Co., 322 U.S. 42.44 (1944), provides two principal enforcement routes for arbitration agreements in "contracts evidencing a transaction involving commerce." 9 U.S.C. §2 (1982). Under Section 3, an arbitration agreement may be passively enforced in an ongoing proceeding by motion for a stay pending arbitration. This section "obviously envisages action in a court on a cause of action and does

not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate." The Anaconda, 322 U.S. at 44. Under section 4, a party may bring an action whose sole purpose is to compel arbitration. "Provision is made for framing an issue and trying it as to whether the parties are bound to arbitrate and the entry of an order accordingly." Id. at 45.[4]

As has been recently explained, a section 4 motion to compel arbitration has often been filed in an ongoing proceeding, see, Hartford Financial Systems, Inc. v. Florida Software Services, Inc., 712 F.2d 724, 728 (1st Cir, 1983), thereby blurring

[4]The act also authorizes parties who have completed arbitration to apply to a district court for entry of the award, 9 U.S.C. §9, or for its vacation, 9 U.S.C. §10; see, also 9 U.S.C. §§201-208 (governing recognition and enforcement of foreign arbitral awards and arbitration agreements involving foreign entities).

the distinction established by the Arbitra- Act between orders under section 3 staying on- going proceedings and orders in independent proceedings to compel arbitration under sec- tion 4. However, it makes no practical dif- ference whether the court enters an order in an ongoing suit compelling arbitration or merely stays its own proceedings. In either event, arbitration is the sine qua non before proceeding. Indeed, the Supreme Court long ago suggested that "power to grant a stay is enough without the power to order that the arbitration proceed, for, if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration." The Anaconda, 322 U.S. at 45; accord, Hartford Financial Systems, 712 F.2d at 728-29; see, Metropolitan World Tanker Corp. v. P.N. Pertambangan Minjakdan Gas Bumi Nasional, 427 F.Supp. 2, 4 (S.D.N.Y. 1975) (Section 3 stay "clearly a remedy intended for a de- fendant who wants to compel plaintiff to

arbitration"). Arbitration is also the next sequential step under the other route to compelling arbitration, a separate proceeding under section 4. The principal distinction between orders relating to arbitration in a separate proceeding and in an ongoing proceeding is that in the former there are essentially no proceedings to stay because the order re arbitration resolves the matter at issue.

Various bases were given for appellate jurisdiction over orders which in effect required arbitration. Stays of proceedings pending arbitration were early held to be interlocutory and hence appealable, if at all, under Enelow-Ettleson as injunctions. See, e.g., Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 177-85 (1955); Shanferoke Coal & Supply Corp. v. West-Chester Service Corp., 293 U.S. 449, 451-52 (1935); Kirschner v. West Co., 300 F.2d 133, 134-36 (3d Cir, 1962). Orders compelling arbitration entered in separate pro-

ceedings brought for that purpose only, i.e., section 4 proceedings, despite some mixed signals from the Supreme Court, see, e.g., Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, 456-57 (1935) (characterizing order "direct[ing] the parties to proceed to arbitration, stay[ing] trial of the action pending filing of the award, and retain[ing] jurisdiction" as interlocutory ones "merely stay[ing] action in the court pending arbitration"), came to be treated as final orders appealable under section 1291, see, e.g. Rogers v. Schering Corp., 262 F.2d 180 (3d Cir.), cert denied, 359 U.S. 991 (1959); Farr & Co. v. Cia. Intercontinental de Navegacion de Cuba, S.A. 243 F.2d 342 (2d Cir, 1957); Krauss Bros. Lumber Co. v. Louis Bossert & Sons, 62 F.2d 1004 (2d Cir, 1933).

While Enelow-Ettleson endured, the difference was functionally unimportant; no matter whether the order was one staying

proceedings or compelling arbitration in an ongoing proceeding or one compelling arbitration in a separate proceeding filed for that purpose, a way was likely to be found for its appeal. Some courts based their analysis of appealability on the nature of the underlying proceedings (i.e., whether the suit was directed only at securing arbitration), see, e.g., Rogers, 262 F.2d at 180-82; see also Formigli Corp. v. Alcar Builders, Inc., 329 F.2d 79, 80 (3d Cir 1964), while others looked only to the order's label (i.e., whether it was styled as an order compelling arbitration or as a stay), see, e.g., Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.,636 F.2d 51, 53 (3d Cir, 1980); Gavlik, 526 F.2d at 782. See, generally Hartford Financial Systems, 712 F.2d at 728 (summarizing varying approaches among the circuits). In recent years, this writer and other members of this Court assumed such orders were appealable without extended discussion of the

form of order or the nature of the proceeding in which it was entered. See, e.g., Osterneck, 841 F.2d at 509-10; Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923, 929 (3d Cir, 1985); Goodwin v. Elkins, 730 F.2d 99, 101 n.2 (3d Cir), cert denied, 469 U.S. 821 (1984); Bechtel Corp. v. Local 215 Laborer's Int'l Union, 544 F.2d 1207, 1210 n.3A (3d Cir, 1976). Compare Rhone Mediteranee Compagnia v. Lauro, 712 F.2d 50, 51 (3d Cir, 1983) (grant of stay pending arbitration appealable) with Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, 797 F.2d 1197, 1199 n.1 (3d Cir, 1986) (citing Rhone for proposition that orders compelling arbitration are appealable), vacated on other grounds, 107 S.Ct. 3204 (1987).

The law of appellate jurisdiction over arbitration orders acquired what one judge described as "Byzantine peculiarities." New England Power Co. v. Asiatic Petroleum Corp. 456 F.2d 183, 189 (st Cir, 1972). In the wake of Gulfstream's abrogation of the

Enelow-Ettleson doctrine, it will once again be imperative to analyze appealability of orders effecting arbitration under the various sources of appellate jurisdiction.

B.

SECTION 1291

We turn first to the paramount source of our jurisdiction, 28 U.S.C. §1291. The leading case in this circuit analyzing arbitration orders under §1291 is Rogers v. Schering Corp. where Judge Maris, writing for the in banc court, set forth the rule that an order requiring arbitration is appealable as final under 28 U.S.C. §1291 "where it is not merely a step in the judicial enforcement of a claim nor auxiliary to the main proceeding but is the full relief sought...Such cases are to be distinguished from those in which an order for arbitration is made in the course of a continuing suit for other relief." 262 F.2d at 182 (citations omitted); accord Commonwealth Insurance Co. v. The Underwriters, Inc., 846 F.2d 196

198 (3d Cir, 1988) see, Chatham Shipping Co. v. Fertex Steamship Corp., 352 F.2d 291 (2d Cir. 1965); see, also Goodall-Sanford, Inc., v. United Textile Workers, 353 U.S. 550 (1957) (order entered in proceeding to compel arbitration under §301 of LMRA final under 28 U.S.C. §1291.

The facts of Rogers are illustrative of arbitration orders entered in independent proceedings. Schering, a German-owned company valuable patents which had come under United States control following the outbreak of World War II, had agreed with the United States Attorney General to license the patents to qualified appellants on a non-exclusive basis at a reasonable royalty fixed by negotiation or arbitration. Schering declined to license Hexagon Laboratories on the ground it was not qualified. On Hexagon's application, the district court found Hexagon qualified and ordered Schering to arbitrate the amount of the royalty rate.

Brownell v. Schering Corp., 146 F.Supp. 106 (D.N.J. 1956). After the arbitration, Schering brought a separate action under Section 9 of the arbitratrion Act seeking confirmation of the resulting arbitration award based on a dispute that had arisen concerning the composition of the panel. The District Court ruled in favor of Hexagon, vacating the award because one of the arbitrators was disqualified. Rogers v. Schering Corp., 165 F.Supp. 295 (D.N.J., 1958). Schering appealed, and this court denied Hexagon's argument that the order lacked the requisite finality.

In finding appellate jurisdiction, this court recognized that the district court's order "merely opened the way for the continued operation of the prior order directing the parties to negotiate the royalty rate to be inserted in Schering's patent license to Hexagon and if necessary to arbitrate it." 262 F.2d at 182. An award arising out of a new round of arbi-

tration pursuant to that order would not require judicial approval to take effect. "Therefore, unless Schering now has a right to appeal from the order...it will in all probability never be able to secure an appellate review of that order." Id. at 182-83.

The Rogers court drew a distinction based on the procedure from which the arbitration order arose. It explained:

> "the underlying rationale..is that an order directing arbitration is interlocutory and therefore, not appealable if it is made in a lawsuit, such as a suit for damages, in which in the normal course of judicial procedure there will be a later final order or judgment from which an appeal can be taken by a person aggrieved by the prior order to arbitrate. If, however, the order to arbitrate will not in the normal course of procedure be followed by another judicial order which will be required to carry the arbitration award into effect, the order to arbitrate must be regarded as final if the right to review it on appeal is to be given."

262 F.2d at 182; see, also Patten Secs. Corp. v. Diamond Greyhound & Genetics, Inc., 819 F.2d 400, 403 (3d Cir, 1987) (arbitration order not final where it "clearly contemplates the possibility of further proceedings."); Formigli, 329 F.2d at 80 (Order staying proceedings and compelling arbitration treated as interlocutory stay order); Turkish State Rys. Administration v. Vulcan Iron Works, 230 F.2d 108, 108 (3d Cir, 1956) (order denying motion to compel arbitration and stay proceedings "clearly...interlocutory").

Rogers' reliance on the procedural posture of the underlying litigation was supported by the cases which it cited. Goodall-Sanford, its principal source of support, held that orders entered in proceedings to compel arbitration pursuant to §301(a) of the Labor Management Relations Act of 1947 were final and appealable under §1291, 353 U.S. at 551-552. The Goodall-Sanford Court distinguished cases

like Baltimore Contractors and Schoenamsgruber, in which the arbitration order was "ancillary to a main proceeding," because arbitration here was "the full relief sought." 353 U.S. at 551. Similarly, the commercial arbitration cases Rogers cited, see, e.g., Farr & Co. v. Cia. Intercontinental de Navegacion de Cuba, S.A., 243 F.2d 342, 344-45 (2d Cir, 1957); Continental Grain Co. v. Dant & Russell, 118 F.2d 967, 968 (9th Cir, 1941), relied squarely on the fact that arbitration was the sole relief sought in the suit and distinguished Schoenamsgruber on that basis. Thus, although we recognize that several circuits have adopted the view that the appealability of arbitration order is independent of the nature of the proceedings out of which the roder issues, see., e.g. Cincinnati Gas & Electric v. Benjamin F. Shaw Co., 706 F.2d 155, 157-58 (6th Cir, 1983); Seaboard Coast Line Railroad Co. v. Trailer Train Co., 690 F.2d 1343, 1344 n.1 (11th Cir, 1982); City of Naples v. Prepakt Con-

crete Co., 494 F.2d 511, 512 (5th Cir), cert denied, 419 U.S. 843 (1974); but see, e.g., Hartford Financial Systems, 712 F.2d at 728-29 (1st Cir); Karavos Compania Naveria S.A. v. Atlantica Export Corp., 588 F.2d 1, 7, (2d Cir, 1978), we believe that Rogers remains the proper interpretation of the law.

This case, in which the defendant in a suit for statutory and common law damages has moved to compel arbitration, would appear to fall clearly within the rule of Rogers that orders arising out of a law suit "such as a suit for damages" are interlocutory and not appealable as final orders. Arbitration is not the full relief sought by the plaintiff; indeed, the plaintiff opposes arbitration. The magistrate retains jurisdiction and may be expected in the ordinary course of proceedings to issue the further orders necessary to effectuate the results of arbitration. When a final order is entered in this case, the issue of whether

or not the magistrate properly ordered arbitration will be ripe for review. See, e.g., Commonwealth Insurance Co., 846 F.2d at 198; Langley v. Colonial Leasing Co. of New England, 707 F.2d 1, 4 (st Cir, 1983).

Applying Rogers to the facts of this case, however, places us in conflict with Gavlik, which Zosky relies on to sustain our jurisdiction. In Gavlik, two subcontractors sued the general contractor for payment for work done. The contractor invoked the arbitration clause of its agreement, and the district court stayed its proceedings and required the parties to arbitrate. In considering our appellate jurisdiction, we found jurisdiction over the stay order under the Enelow-Ettleson doctrine, and found jurisdiction over the order compelling arbitration by relying on Rogers and Goodall-Sanford. The language used appeared unambiguously to follow the Rogers rule:

> "The order compelling commercial arbitration here, like the order compelling labor arbitration in Goodall-Sanford,...represents the 'full relief' sought by Campbell. Once the parties are directed to arbitration, judicial involvement in the controversy for all practical purposes ends, as it is the arbitrator who then resolves all matters in dispute. Hence, the arbitration order [in this case] being neither a step in the judicial enforcement of the disputed claims, nor auxiliary to any main proceeding, is a final decision over which we have jurisdiction pursuant to 28 U.S.C. §1291."
>
> 526 F.2d at 782.

However, because the order compelling arbitration in Gavlik was entered in an ongoing proceeding, rather than in a separate proceeding, the acceptance of jurisdiction was in effect contrary to the rule that this court, sitting in banc, had earlier set in

Rogers.[5]

Although there may, in fact, be very little practical difference in the "normal course of proceedings" between arbitration orders arising out of ongoing cases and arbitration orders arising in a proceeding to compel arbitration. Rogers, following the supreme Court's lead, enunciated a rule under which only the latter are appealable final orders. To the extent that Gavlik is inconsistent with prior precedent, it "must be deemed without effect." O. Hommel Co. v. Ferro

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[5]We note, however, that because the stay portion of Gavlik was appealable under Enelow-Ettleson, the distinction made between the stay and the order compelling arbitration was unnecessary. For example, in Formigli Corp. v. Alcar Builders, Inc., 329 F.2d 79, 80 (3d Cir, 1964), this court, faced with the same situation, treated an order both compelling arbitration and staying proceedings as an interlocutory stay order. The entire order in Gavlik was interlocutory in nature and was entirely appealable at that time under the then prevailing precedent. We could thus regard Gavlik's section 1291 rationale as dictum had it not spawned a following of its own.

Corp., 659 F.2d 340, 354 (3d Cir, 1981), cert denied, 455 U.S. 1017 (1982). Only the supreme Court, or this court sitting in banc, may alter this rule.[6]

It may appear anomalous for the appealability of what amounts to the same order to depend on the procedural posture of the case in the district court. As Judge Friendly

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[6]An examination of this court's cases citing Gavlik reveals bases for appellate jurisdiction other than Gavlik's interpretation of section 1291. See, e.g., Towers, Perrin, Forster & Crosby, Inc. v. Brown, 732 F.2d 345, 346 (3d Cir, 1984) (order compelling arbitration and staying pending state court proceedings appealable final order); Becker Autoradio v. Becker Autoradiowerk GmbH., 585 F.2d 39, 42 (3ed Cir, 1978) (order denying motion to stay proceedings and compel arbitration appealable under Enelow- Ettleson); United Steelworkers of America v. Canron, Inc., 580 F.2d 77, 79 n. 4 (3d Cir, 1978) (appeal from order in suit to compel arbitration under §301 of LMRA); Bechtel Corp. v. Local 215, Laborer's Int'l Union, 544 F.2d 1207, 1209-10 & n.3A (order granting stay and compelling arbitration appealable under Enelow-Ettleson) But see Goodwin v. Elkins & Co. 730 F.2d 99, 101 n.2 (3d Cir), cert denied,469 U.S. 831 (1984) (relying on Gavlik in treating an order compelling arbitration arising out of a suit for damages as a final order); Par-Knit Mills v. Stockbridge Fabrics, 636 F.2d 51 (3d Cir, 1980) (same).

long ago observed:

> "If the slate were clean, a good deal might be said for the position that even though an order directing arbitration seems 'final' in the formal sense that it is the last thing the court is then being asked to direct, it should be realistically viewed as an intermediate step in a proceeding that will not result in a truly final decision until an award has been rendered by the aribtrators and an order has been made to enforce it."

Chatham Shipping v. Fertex S.S. Corp., 352 F.2d 291, 294 (2d Cir, 1965); see, Stateside Machinery Co., Ltd. v. Alperin, 526 F.2d 480, 483 (3d Cir, 1975). While we share this concern, like Judge Friendly we recognize that the slate is not clean, and note that, at the very least, the rule serves the purpose of preventing piecemeal appeals and minimizes the degree to which appealability depends on the mere form of the order. See, Hartford Financial Systems, Inc. v. Florida Software Services, Inc., 712 F.2d 724, 728-29 (1st Cir, 1983).

We conclude that the district court's order compelling arbitration in this case is

not a final order under §1291[7].

C.

OTHER BASES OF JURISDICTION

After Gulfstream, the repudiated Enelow-Ettleson doctrine can no longer be used as the basis for appellate jurisdiction under 28 U.S.C. §1291(a)(1). The Court nonetheless made clear in Gulfstream that orders formerly appealable under Enelow-Ettleson may be appealable under some other basis. Nothing in its decision, the Court explained:

[7] Judge Hutchinson joins the court's opinion believing it correctly reasons from the binding authority set forth in this section that orders directing arbitration in actions brought for the very purpose of compelling it are treated differently from orders directing arbitration when an arbitration clause is asserted as a defense in the course of a continuing suit for other relief. He notes, however, that from the standpoint of judicial efficiency there is much to commend Judge Friendly's view that all such orders should be treated as non-final, and, hence, not appealable under §1921.

"will...prevent interlocutory review of district court orders when such review is truly needed. Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that...have the practical effect of granting or denying injunctions and have 'serious, perhaps irreparable consequence.' Carson v. American Brands, Inc., 459 U.S. 79, 84, 101 S.Ct. 993, 996, 67 L.Ed.2d 59 (1981)...As for orders that were appealable under §1291 (a)(1) solely by virtue of the Enelow-Ettleson doctrine, they may, in appropriate circumstances, be reviewed under the collateral-order doctrine of §1291, see Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), and the permissive appeal provision of §1291(b), as well as by application for writ of mandamus." Gulfstream[8] 108 S.Ct. at 1142-43

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[8]Zosky suggests, citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959), that this case is reviewable under a writ of mandamus because the magistrate's order deprives her of her right to trial by jury. Reliance on Beacon Theatres, which emphasized the very limited discretion of district judges to foreclose the jury trial of legal issues through the prior determination of equitable ones, is, obviously, misplaced. In addition to the fact that Zosky agreed to the resolution of her claim before an arbitrator the order here does not present the Beacon Theatres, situation. See. USM Corp. v.

To be appealable under either the collateral-order doctrine or as a virtual injunction, an order must, among other things, be such that review postponed will, in effect, be review denied. See, Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978), (["collateral] order must...be effectively reviewable on appeal from a final judgment."); Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981) (litigant must show that order appealed from as an injunction not only will have "serious, perhaps irreparable" consequences but also can be "effectually challenged" only if immediately appealed). See, generally, Hinton v. Department of Justice, 844 F.2d 126, 121-31 (3d Cir, 1988). Here, as we have explained, the decision in an ongoing lawsuit to either

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[8] GKN Fasteners, Ltd., 574 F.2d 17, 19-20 (1st Cir, 1978). Therefore, we decline to exercise our authority to treat this appeal as a petition for a writ of mandamus. See, Gold v. Johns-Manville Sales Corp., 723 F.2d 1068, 1074 (3d Cir, 1983).

stay proceedings or compel arbitration will be fully reviewable because the parties will have an opportunity to secure a final order from the district court in the pending proceeding. See, e.g., Commonwealth Insurance Co., 846 F.2d at 198; Hartford Financial Systems, 712 F.2d at 729; Stateside Machinery Co. v. Alperin, 526 F.2d at 483-84 (3d Cir, 1979). Indeed in Ayres v. Merrill Lynch Pierce, Fenner & Smith, 538 F.2d 532 & n.6 (3d Cir), cert. denied, 429 U.S. 1010 (1976), after we dismissed an appeal from a stay of proceedings pending arbitration, the case ultimately returned to this court for review from the district court's final order confirming the arbitral decision.

Moreover, no irreparable harm will be done to either party by requiring arbitration without an interlocutory appeal. See, Stateside Machinery Co. v. Alperin, 526 F.2d 480, 483-84 (3d Cir, 1975) ("permitting arbitration to proceed [by denying

stay of arbitration] is not likely to have 'serious, perhaps irreparable consequences' because arbitration orders are not self-executing. 9 U.S.C. §9. If arbitration was improper, presumably the court will not enforce any award."); accord, New England Power, 456 F.2d at 185.

At worst, the parties will have been subjected to the expense of obtaining an arbitration award that ultimately proves to be unenforceable as wrongly ordered; although this would be unfortunate, the prospect is not so grim as to justify departing from the general rule disfavoring piecemeal appeals. New England Power, 456 F.2d at 185; Stateside Machinery Co. 526 F.2d at 484 ("The cost of participating in a proceeding which may ultimately be set aside is not the kind of injury against which §1292(a)(1) is intended to guard.").

We thus can find no basis for applying section 1292(a)(1) or the collateral order

doctrine to an order staying proceedings or compelling the parties in an ongoing lawsuit to arbitrate.[9]

D.

POLICY CONSIDERATIONS

Although we are not makers of policy, we cannot avoid consideration of the practical effect of our decision that orders staying proceedings or compelling the parties in an ongoing lawsuit to arbitrate are nonappealable interlocutory orders. Arbitration is an expeditious and inexpensive mode of alternative dispute resolution. Allowing interlocutory appeals of such orders would defeat the attractiveness of arbitration by imposing delay and additional expense. See, USM Corp. v. GKN Fasteners, Ltd., 574 F.2d 17, 18, 20-21 (1st Cir, 1978). Immediate appealability would thus detract from the

[9]We do not decide whether an order denying a motion for arbitration is distinguishable for purposes of appealability from an order staying proceedings or compelling arbitration.

broad federal policy in favor of arbitration, emphasized repeatedly by the Supreme Court. See, e.g., Perry v. Thomas, 107 s.Ct. 2520, 2525 (1987); Shearson, 107 S.Ct. at 2337-38; Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 216 (1985).

Our holding is also consistent with the Supreme Curt's limitation of appealability of interlocutory orders in other contexts. As the Court has stated, permitting wholesale appeals of orders entered in the course of proceedings "would constitute an unjustified waste of scarce judicial resources." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368m 378 (1981) (order denying motion to disqualify counsel not immediately appealable); see, also Flanagan v. United States, 465 U.S. 259, 269-70 (1984) (order disqualifying counsel not immediately appealable); Gardner v. Westinghouse Broadcasting Co.,

437 U.S. 478, 480-82 (1978) (order denying class certification not immediately appealable); Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) (same). We are thus satisfied that our holding is supported by important policy concerns about the allocation of judicial business between district courts and the court of appeals.

CONCLUSION

For the foregoing reasons, the appeal will be dismissed for want of jurisdiction. We consequently do not reach the merits of any issue presented.

A True copy:

Teste:

Clerk of the United States Court of Appeals For the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOROTHY ZOSKY	:	
	:	CIVIL ACTION
vs.	:	
	:	
DANIEL B. BOYER and BOENNING & SCATTER-GOOD, INC.,	:	NO. 86-1816

O R D E R

AND NOW, this 1st day of December, 1987, upon reconsideration of the defendants' Motion To Compel Arbitration, it is hereby ORDERED and DECREED that defendants' Motion To Compel Arbitration is hereby GRANTED; plaintiff is directed to proceed forthwith to the National Association of Securities Dealers and/or the Philadelphia Stock Exchange and assert any and all claims set forth in the Complaint against defendants in accordance with the terms of the arbitration provision contained in the Customer Agreement executed by plaintiff on April 4, 1983.

BY THE COURT:

/S/ Tullio Gene Leomporra

Entered: 12/1/87, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOROTHY ZOSKY, Plaintiff	:	CIVIL ACTION
vs.	:	
	:	NO. 88-1816
DANIEL BOYER and BOENNING & SCATTERGOOD, Defendants,	:	

O R D E R

AND NOW, to with, this 4th day of September, 1987, it is hereby ORDERED that the defendant's Motion to refer this matter to arbitration is DENIED. The jury trial is continued from 15 September 1987 to Tuesday, 22 September 1987 at 10:00 a.m. in Courtroom 5A.

It is so ORDERED.

BY THE COURT:

/S/Tullio Gene Leomporra
TULLIO GENE LEOMPORRA
ADMINISTRATIVE U.S. MAGISTRATE

ENTERED: 9/8/87

CLERK OF COURT

Filed September 4, 1987

§1291. Final Decisions of District Courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Oct. 31, 1951, C 655 §48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508 §12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, §124, 96 Stat. 36).

§1292. Interlocutory Decisions.

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

BOENNING & SCATTERGOOD, INC.
THE ALISON BUILDING
RITTENHOUSE SQUARE
PHILADELPHIA, PA 19103

CUSTOMER AGREEMENT

In consideration of your accepting and carrying for the undersigned one or more accounts, whether cash, margin or otherwise, and whether designated by name, number or otherwise, the undersigned hereby consents and agrees that:

1. APPLICABLE RULES AND REGULATIONS

All transactions for the undersigned shall be subject to the constitution, rules regulations, customs and usages of the exchange or market and its clearing house, if any, where the transactions are executed by you or your agents, including your subsidiaries and affiliates.

2. DEFINITION

(a) For purposes of this agreement "securities, commodities and other property" shall include, but not be limited to money, securities and commodities of every kind and

nature and all contracts and options relating thereto, whether for present or future delivery.

(b) A sell order for "long account" is for the sale of securities then owned by the undersigned.

(c) A sell order for "short account" is for the sale of securities which the undersigned shall be obligated to acquire by a date certain in the future and constitutes a loan to the undersigned.

3. LIEN

All securities, commodities and other property now or hereafter held, carried or maintained by you in your possession or control for any purpose, including safekeeping, in or for any of the accounts of the undersigned, now or hereafter opened, including any accounts in which the undersigned may have an interest, shall be subject to a lien for the discharge of all indebtedness and other obligations of the undersigned to you, and are to be held by you as security for the

payment of any liability or indebtedness of the undersigned to you in any of said accounts. You shall have the right to transfer securities, commodities and other property so held by you from or to any other of the accounts of the undersigned (other than accounts restricted by law) whenever, in your judgment, you consider such a transfer necessary for your protection. In enforcing your lien, you shall have the discretion to determine which securities and property are to be sold and which contracts are to be closed.

4. LIQUIDATION

You shall have the right, in accordance with your general policies regarding your margin maintenance requirements, as such may be modified, amended or supplemented from time to time, or if, in your discretion you consider it necessary for your protection to require additional collateral at an earlier or later point in time than

called for by said general policies, or in the event that a petition in bankruptcy, or for appointment of a receiver is filed by or against the undersigned, or an attachment is levied against the accounts of the undersigned, or in the event of the death of the undersigned, to sell any or all securities, commodities and other property in the accounts of the undersigned with you, whether carried individually or jointly with others, to buy any or all securities, commodities and other property which may be short in such accounts, to cancel any open or outstanding orders and to close any or all outstanding contracts, all without demand for margin or additional margin, notice of sale or purchase, or other notice or advertisement. Any such sales or purchases may be made at your discretion on any exchange or other market where such business is usually transacted, or at public auction or private sale; and you may be the purchasers for your own account. Any prior demand, or call, or prior notice of the

time and place of such sale or purchase shall not be considered a waiver of your right to sell or buy without demand or notice as herein provided.

5. PURCHASES OR SALES

All orders for the purchase or sale of any securities, commodities and other property are given by the undersigned and executed with the express understanding that an actual purchase or sale is intended. In case of purchase the undersigned shall receive and pay for any securities, commodities or other property upon demand. In case of sale the undersigned shall deliver to you such securities, commodities or other property as are necessary to cover the sale prior to the date of settlement. In the event that the undersigned fails to make any such delivery, the undersigned authorizes you to borrow any security, commodity or other property necessary to cover the sale, and the undersigned will be responsible and will indemnify and hold you

harmless for any loss you may sustain thereby, for any premiums you may be required to pay thereon and for any liability which you may sustain by reason of your inability to borrow any security, commodity or other property sold.

6. SHORT AND LONG SALES

Unless the undersigned specifically designates a sale order for short account, all orders shall be deemed to be for long account. For all sales for long account where you do not possess, maintain or control the securities, commodities or other property of the undersigned in any account of the undersigned, the undersigned shall deliver the securities, commodities or other property as soon as possible and in any event prior to the settlement date.

7. PAYMENT OF INDEBTEDNESS UPON DEMAND

The undersigned shall at all times be liable for the payment upon demand of any debit balance or other obligations owing in any of the accounts of the undersigned with you and, the undersigned shall be liable to you for any

deficiency remaining in any such accounts in the event of the liquidation thereof, in whole or in part, by you or by the undersigned; and, the undersigned shall make payment of such obligations and indebtedness upon demand.

8. LIABILITY FOR COSTS OF COLLECTION

The reasonable costs and expenses of collection of the debit balance and any unpaid deficiency in the accounts of the undersigned with you, including, but not limited to, attorney's fees incurred by you, shall be payable to you by the undersigned.

9. PLEDGE OF SECURITIES, COMMODITIES & OTHER PROPERTY

All securities, commodities and other property now or hereafter held, carried or maintained by you in your possession in any of the accounts of the undersigned may be pledged and repledged by you from time to time, without notice to the undersigned, either separately or in common with other securities, commodities and

other property for any amount due in the account of the undersigned, or for any greater amount, and you may do so without retaining to your possession or control for delivery a like amount of similar securities, commodities or other property. You are not required to deliver to the undersigned the same securities, commodities and other property held, carried or maintained by you for the undersigned, but only property of the same kind and amount.

10. MARGIN REQUIREMENTS AND CREDIT CHARGES

The undersigned will at all times maintain such securities, commodities, and other property in the accounts of the undersigned for margin purposes as you shall require from time to time. Credit terms shall be as set forth in Exhibit "A" attached and made part hereof.

11. TERMINATION OF ACCOUNT

You may at any time terminate any of the accounts of the undersigned and thereupon all amounts advanced by you and other balances

owing shall be due and payable upon demand.

12. AGENCY

In all transactions between you and the undersigned, you shall serve as agent or broker on behalf of the undersigned except when you disclose that you are acting, with respect to a particular transaction, as dealer for your own account or as broker for some other person. You may employ sub-brokers or other-agents, as either your agents or as agents of the undersigned, in connection with the execution of any order or the consummation of any other transaction, and you shall be responsible only for the exercise of reasonable care in their selection. Commissions shall be charged in accordance with applicable usage. You may, in exercising your discretion, settle any controversies or disputes according to the usage of the exchange or market involved.

13. ACCOUNTS CARRIED AS CLEARING BROKER

If you are carrying the account of the undersigned as clearing broker by arrangement with

another broker through whose courtesy the account of the undersigned has been introduced, then until receipt from the undersigned of written notice to the contrary, you may accept from such other broker, without inquiry or investigation by you; (i) orders for the purchase or sale in said account of securities and other property on margin or otherwise, and (ii) any other instructions concerning said account. You shall not be responsible or liable for any acts or omissions of such other broker or its employees.

14. PRESUMPTION OF RECEIPT OF COMMUNICATIONS

Communications may be sent to the undersigned at the address of the undersigned or at such other address as the undersigned may hereafter give you in writing, and all communications so sent, whether by mail, telegraph, messenger or otherwise, shall be deemed given to the undersigned personally, whether actually received or not.

15. AGREEMENT TO ARBITRATE CONTROVERSIES

Except as may otherwise be provided by law, it

is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the rules then obtaining of either the Philadelphia Stock Exchange or pursuant to the Code of Arbitration Procedure of the National Association of Securities, Dealers, Inc. as the undersigned may elect. Arbitration must be commenced by service upon the other of a written demand for arbitration or a writeen notice of intention to arbitrate, therein electing the arbitration tribunal. In the event the undersigned does not make such designation within five (5) days of such demand or notice, then the undersigned authorizes you to do so on behalf of the undersigned. Any arbitration hereunder shall be before at least three arbitrators, and the award of the arbitrators, or a majority of them, shall be final. Judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

16. GOVERNING LAW

This agreement and its enforcement shall be governed by the laws of the Commonwealth of Pennsylvania; shall cover individually and collectively all accounts which the undersigned may open or reopen with you; and shall inure to the benefit of your successors whther by merger, consolidation or otherwise, and assigns, and you may transfer the accounts of the undersigned to your successors and assigns, and this agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the undersigned.

17. EXTRAORDINARY EVENTS

You shall not be liable for loss caused directly or indirectly by government restrictions exchange or market rulings, suspension of trading, war, strikes or other conditions beyond your control.

18. REPRESENTATION AS TO CAPACITY TO ENTER INTO AGREEMENT

The undersigned, if an individual, represents that the undersigned is of full age,

that the undersigned is not an employee of any exchange, or of any corporation of which any exchange owns a majority of the capitol stock, or of a member of any exchange, or of a member firm or member corporation registered on any exchange or of a bank, trust company, insurance company or of any corporations, firm or individual engaged in the business of dealing either as broker or as principal in securities, bills of exchange acceptances or other forms of commercial paper. The undersigned further represents that no one except the undersigned has an interest in the account or accounts of the undersigned with you.

19. JOINT AND SEVERAL LIABILITY

If the undersigned shall consist of more than one individual, their obligations under this agreement shall be joint and several.

20. SEPARABILITY

If any provision or condition of this agreement shall be held to be invalid or

unenforceable by any court or regulatory or self-regulatory agency or body, such invalidity or unenforceability shall attach only to such provision or condition, and the validity of the remaining provisions and conditions shall not be affected thereby. This Agreement shall be carried out as if any such invalid or unenforceable provision or condition were not contained herein.

21. HEADINGS ARE DESCRIPTIVE

The heading of each provision hereof is for descriptive purposes only and shall not be deemed to modify or qualify any of the rights or obligations set forth in each provision.

DATED: 4/4/83 ACCOUNT NO. 280063

SIGNATURES:

_____ _____

_____ _____

Supreme Court, U.S.
FILED
DEC 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-906

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DOROTHY ZOSKY,
Petitioner
v.

DANIEL BOYER AND
BOENNING & SCATTERGOOD, INC.,
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENTS DANIEL BOYER AND BOENNING & SCATTERGOOD, INC.

Tom P. Monteverde
Jean C. Hemphill
Monteverde, Hemphill,
Maschmeyer & Obert
2230 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109-1022
(215) 735-1900

Attorneys For Respondents
Daniel B. Boyer, III and
Boenning & Scattergood, Inc.

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This Brief is filed on behalf of respondents Daniel Boyer and Boenning & Scattergood, Inc.[1]

COUNTERSTATEMENT OF QUESTION INVOLVED

Was the Court of Appeals correct in dismissing Petitioner's appeal of the district court's order staying a federal court securities fraud action and compelling industry arbitration of the claims pursuant to the agreement of the parties on the basis that it was an unappealable interlocutory order?

OPINIONS BELOW

A reproduction of the Third Circuit Court of Appeals opinion below is provided in the Appendix to Petition for Writ of Certiorari ("P-App."). The Court

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[1] Boenning & Scattergood, Inc. ("Boenning") is a privately owned Pennsylvania corporation.

of Appeals decision is now published at 856 F.2d 554 (3d Cir. 1988).

JURISDICTION

The Petition for Writ of Certiorari states that jurisdiction of this Court rests upon 28 U.S.C. Section 1241(1) and Rule 17 of this Court. There being no such section, respondents believe petitioner meant to state that jurisdiction of this Court rests upon 28 U.S.C. Section 1254(1).

COUNTERSTATEMENT OF THE CASE

Respondent Boenning and Scattergood, Inc. ("Boenning") is a regional securities brokerage firm and a member of the National Association of Securities Dealers ("NASD"). Daniel B. Boyer, III ("Boyer"), a registered securities representative employed by Boenning, was Petitioner's broker having followed him

to Boenning from his previous brokerage firm. At the commencement of her business relationship with Boenning, petitioner signed a Customer Agreement agreeing, inter alia, "to submit to arbitration any controversy between us arising out of your business or this agreement" (P-App. 71-72). Petitioner made several investments in her account at Boenning. One investment of twenty thousand dollars in a small start-up computer company was lost, however, when the company failed. Petitioner then sued the firm and her broker alleging misrepresentation and fraud based on respondents' sale of an allegedly unsuitable investment.

In their answer to the Complaint, respondents alleged as a defense the arbitration agreement and, at the same time, asked petitioner's counsel to

submit the claim to arbitration, which request was refused by petitioner. No motion to enforce the arbitration agreement was filed because such agreements were viewed as unenforceable by the Third Circuit Court of Appeals in investor securities fraud complaints at that time. See Opinion of the Court of Appeals (P-App. 26-27 and n.2).

Accordingly, the case proceeded to Federal Court arbitration and the arbitrators entered an award in favor of respondents on October 24, 1986, which was appealed, de novo, by petitioner. Shortly before the matter was to be tried, by consent, before the United States Magistrate, with direct right of appeal to the Court of Appeals, this Court filed its decision in Shearson/American Express, Inc. v. McMahon, ___ U.S. ___, 107 S.Ct. 2332, 96

L.Ed.2d 185 (1987), confirming the enforceability of customer/broker arbitration agreements even in cases alleging violations of the anti-fraud provisions of at least some of the federal securities laws. Immediately thereafter, respondents prepared and filed a Motion to Compel Arbitration, which petitioner opposed. On September 4, 1987, Magistrate Leomporra denied respondents' Motion to Compel Arbitration. The respondents filed a Notice of Appeal of the Order in the Third Circuit Court of Appeals.

Magistrate Leomporra requested further argument on the Motion to Compel Arbitration stating at the time that since an appeal had been filed he had no authority to alter his Order but he wished to hear further regarding the parties' legal positions in connection

with his preparation of an Opinion for review by the Court of Appeals. The Magistrate also requested further memoranda with respect to the issues raised in the Motion to Compel Arbitration. On October 13, 1987, Judge Leomporra issued a Memorandum Opinion in which he concluded that his decision denying the Motion to Compel Arbitration was erroneous. The Magistrate did not vacate the Order, however, acknowledging that he had no authority to do so because of the pending appeal, but he suggested that the respondents might withdraw their appeal so that the case would be returned to him for revision of the Order.

Based on that suggestion, respondents filed a Praecipe to withdraw the appeal on or about November 5, 1987 and the Clerk of the United States Court of Appeals of the Third Circuit dismissed

the appeal under the authority conferred upon the Clerk by Rule 42(b) of the Federal Rules of Appellate Procedure on November 17, 1987.

On November 25, 1987, respondents filed a Motion for Reconsideration of the Order denying their motion to compel arbitration and after receipt of an answer by petitioner, Magistrate Leomporra, on December 1, 1987, granted the Motion to Compel Arbitration and directed the appellant to proceed to arbitration before the NASD or the Philadelphia Stock Exchange. On December 17, 1987, petitioner filed a Notice of Appeal in the Court of Appeals of the Third Circuit of the Magistrate's December 1, 1987 decision.

On September 8, 1988, the Court of Appeals for the Third Circuit dismissed the appeal for lack of appellate

jurisdiction holding that a district court order compelling arbitration was interlocutory and, therefore, not immediately appealable. On September 30, 1988, the Court of Appeals denied the petitioner's Petition for Rehearing. On December 1, 1988, petitioner filed the subject Petition for Writ of Certiorari.

Reasons For Denying The Writ

Rule 17 of this Court provides:

> A review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor.

The Rule goes on to describe "the character of the reasons" the court will consider in passing upon a Petition for Writ of Certiorari, such as (1) conflicts and decisions between federal courts of appeals on the same issue; (2) wide departures by a federal court of appeals

from the "accepted and usual course of judicial proceedings"; and (3) a decision by a federal court of appeals on an important question of federal law which has not been, but should be, settled by this Court, or which has been decided in a way in conflict with applicable decisions of this Court.

When measured by the foregoing standards, the present Petition is clearly want of merit.

I. The Decision Of The Third Circuit Court Of Appeals In This Matter Properly Followed The Long-Standing Precedents Of Both This Court And The Third Circuit.

A. Background And Summary Of Argument

Prior to this Court's decision in Gulfstream Aerospace Corp. v. Mayacamas Corp., ____ U.S. ____, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988), the Third Circuit routinely accepted jurisdiction over

interlocutory appeals from orders granting or denying motions to compel arbitration under the Enelow-Ettelson[2] rule. Following that rule's abrogation in Gulfstream, the present case prompted the Third Circuit Court of Appeals to re-review the Court's jurisdiction over such orders under 28 U.S.C. Sections 1291 and 1292.

The Court of Appeals correctly concluded that neither Section 1291 nor Section 1292 provided a basis for interlocutory review of the Magistrate's Order. The Court's decision is solidly grounded in the established precedent of this Court in Catlin v. United States, 324 U.S. 229, 223, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945) and the Third Circuit in

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[2] Enelow v. New York Life Insurance Company, 293 U.S. 379 (1935); Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1842).

Rogers v. Schering Corp., 262 F.2d 180 (3d Cir.), cert. denied, 359 U.S. 991, 79 S.Ct. 1121, 3 L.Ed.2d 980 (1959).

B. Petitioner's Complaint With The Decision Of The Court Of Appeals Does Not Challenge The Correctness Of The Law Applied But Rather The Factual Conclusions Of The Court Upon Application Of The Law.

In its decision in this case, the Court of Appeals for the Third Circuit followed the leading case in the Circuit, Rogers v. Schering Corp., 262 F.2d 180 (3d Cir.), cert. denied, 359 U.S. 991, 79 S.Ct. 1121, 3 L.Ed.2d 980 (1959). In Rogers, the Third Circuit Court of Appeals, en banc, established the following guidelines to determine when an order staying a proceeding pending arbitration or compelling arbitration is a final order under Section 1291:

> An order requiring arbitration is appealable as final under 28 U.S.C. Section 1291 'where it

> is not merely a step in the judicial enforcement of a claim nor auxiliary to the main proceeding but is the full relief sought' .... Such cases are to be distinguished from those in which an order for arbitration is made in the course of a continuing suit for other relief. (Citations omitted.) Id., 262 F.2d at 182.

In her Brief, Petitioner concedes that Rogers is the controlling case (Petitioner's Brief, pp. 10-11). Petitioner and the Court of Appeals part company, however, on the application of Rogers to this case. In that connection, the Third Circuit made the following factual analysis:

> This case, in which the defendant in a suit for statutory and common law damages has moved to compel arbitration, would appear to fall clearly within the rule of Rogers that orders arising out of a lawsuit, 'such as a suit for damages', are interlocutory and not appealable as final orders. Arbitration is not the full relief sought by the plaintiff; indeed, the

> plaintiff opposes arbitration. The magistrate retains jurisdiction and may be expected in the ordinary course of proceedings to issue the further orders necessary to effectuate the result of arbitration. When a final order is entered in this case, the issue of whether or not the magistrate properly ordered arbitration will be ripe for review. (P-App. 44-45)

Petitioner, on the other hand, argues:

> If the order compelling arbitration stands and the parties carry out an arbitration, the arbitration award will not require judicial approval or a court decree to put it into effect. The decision of the arbitrators will be binding. Therefore, unless petitioner now has a right to appeal from the order compelling arbitration, she will, in all probability, never be able to secure an appellate review of that order. (Petitioner's Brief, 10-11)

Petitioner's statements are incorrect. If the parties proceed to arbitration, petitioner would not lose

her right to a review of the propriety of the referral to arbitration at the conclusion of the suit--the lower court could review not only that issue, but any other issue which would be the appropriate subject of review by a court after an arbitration proceeding.[3]

Nor is petitioner irreparably harmed by the denial of the interlocutory appeal. The only prejudice to petitioner is the expense and delay arising out of an arbitration on the merits in the arbitration forum. The Third Circuit correctly noted that such expense and delay has never been a valid reason for an immediate appeal of an interlocutory order. New England Power Co. v. Asiatic Petroleum Corp., 426 F. 183 (1st Cir.

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[3] The Federal Arbitration Act, 9 U.S.C. Sections 10 and 11, outlines the power of the court, following the arbitration hearing, to vacate, modify or confirm an arbitration award.

1972); Stateside Machinery Co. v. Alperin, 526 F.2d 480 (3d Cir. 1975).

The Third Circuit's conclusion that the instant order was not a final order appealable under 28 U.S.C.S. Section 1291 is also consistent with decisions in most other circuits. Quinn v. CGR, 828 F.2d 1463 (10th Cir. 1987); Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co., 784 F.2d 831 (7th Cir. 1986); Denley v. Shearson/American Express, Inc., 733 F.2d 39 (6th Cir. 1984); Wren v. Sletten Const. Co., 654 F.2d 529 (9th Cir. 1981); Limbach Co. v. Gevyn Construction Corp., 544 F.2d 1104, cert. denied, 430 U.S. 916 (1st Cir. 1976); Diematic Mfg. Corp. v. Packaging Industries, Inc., 516 F.2d 975 (2d Cir.), cert. denied, 423 U.S. 913 (1975).

C. This Court's Decision In Gulfstream Aerospace Corp. v. Mayacamas Corp. Did Not Alter The Prevailing Law In The Third Circuit With Respect To The Appealability Of Final Decisions Under Section 1291.

This Court, in Gulfstream Aerospace Corp. v. Mayacamas Corp., ____ U.S. ____, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988), reaffirmed the well established general rule which is the foundation of the Rogers decision, namely,[4]:

---

[4] In the Gulfstream case, this Court further opined that the order there was also not reviewable under the "small class of exceptions" carved out of Section 1291 by the Court in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)(the "collateral order doctrine"). The Gulfstream decision repeated the three requirements of the Cohen collateral order exception to the finality rule:

> The order must conclusively determine the disputed question; resolve an important issue completely separate from the merits of the action; and be effectively unreviewable on appeal from a final judgment.

The Court found that the Gulfstream

> A district court's decision is appealable under Section 1291 only when the decision ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Quoting Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945).

Thus, the Petitioner is correct when she states that Gulfstream did not alter the clearly established precedents under Section 1291. As stated above, however, the Court of Appeals did not find that Gulfstream changed Section 1291 and it did not depart from the established precedents under that Section.

Order did not "conclusively determine the disputed question" and thus failed the first prong of the collateral order exception test. Here, the Court of Appeals found no basis for applying the collateral order rule (P-App. 54-55) and Petitioner has not challenged that finding.

D. The Gulfstream Decision Only Affects The Law Under Section 1292(a)(1) And The Third Circuit Did Not Base Its Decision Here On Section 1292(a)(1).

In the second portion of its Opinion in Gulfstream, this Court found that the district court order was not appealable under Section 1292(a)(1). In doing so, this Court expressly overruled its earlier decisions in Enelow v. New York Life Insurance Company, 293 U.S. 379 (1935) and Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942) (the so called "Enelow-Ettelson rule") and held that orders granting or denying stays of "legal" proceedings on "equitable" grounds were not automatically appealable under 28 U.S.C. 1292(a)(1).

In the present case, the Third Circuit Court of Appeals noted that:

> At the time the briefs were filed in this court, the Enelow-Ettelson doctrine, under which certain orders staying or refusing to stay judicial proceedings were treated as appealable injunctions, was an accepted feature of the law of appellate jurisdiction. (Citations omitted.) (P-App. at 29-30)

After further analysis, the Court of Appeals concluded:

> In the wake of Gulfstream's abrogation of the Enelow-Ettelson doctrine, it will once again be imperative to analyze appealability of orders effecting arbitration under the various sources of appellate jurisdiction. (P-App. at 37-38)

In the analysis that followed, the Third Circuit distinguished its earlier decision in Gavlick Construction Co. v. H. F. Campbell Co., 526 F.2d 777 (3d Cir. 1975), to the extent that it is inconsistent with the Rogers decision, with the following note:

> 5. We note however that because the stay portion of

> Gavlick was appealable under Enelow-Ettelson, the distinction made between the stay and the order compelling arbitration was unnecessary. For example, in Formigli Corp. v. Alcar Builders, Inc., 329 F.2d 79, 80 (3d Cir. 1964), this court, faced with the same situation, treated an order both compelling arbitration and staying proceedings as an interlocutory stay order. The entire order in Gavlick was interlocutory in nature and was entirely appealable at the time under the then prevailing precedent. We could thus regard Gavlick's Section 1291 rationale as dictum had it not spawned a following of its own. (P-App. 47)

Thus, the only consideration given to the Gulfstream decision by the Third Circuit Court of Appeals in this case was its effect on the Enelow-Ettelson doctrine. The remainder of the analysis by the Third Circuit related entirely to its own precedent in Rogers and other authorities. Accordingly, petitioner's discussions regarding the distinctions

between this case and the Gulfstream case are misplaced and unnecessary.

E. The Third Circuit Court Of Appeals Decision Is Consistent With Established Policy Of This Court.

As noted by the Court of Appeals, the result reached in this case is consistent with the policy considerations articulated by this Court relating to limiting the appealability of interlocutory orders. The Court of Appeals reasoned:

> Although we are not makers of policy, we cannot avoid consideration of the practical effect of our decision that orders staying proceedings or compelling the parties in an ongoing lawsuit to arbitrate are nonappealable interlocutory orders. Arbitration is an expeditious and inexpensive mode of alternative dispute resolution. Allowing interlocutory appeals of such orders would defeat the attractiveness of arbitration by imposing delay and additional expense. Immediate appealability would thus

> detract from the broad federal policy in favor of arbitration, emphasized repeatedly by the Supreme Court.
>
> Our holding is also consistent with the Supreme Court's limitation of appealability of interlocutory orders in other contexts. As the Court has stated, permitting wholesale appeals of orders entered in the course of proceedings 'would constitute an unjustified waste of scarce judicial resources' *** We are thus satisifed that our holding is supported by important policy concerns about the allocation of judicial business between district courts and the court of appeals. (Citations omitted.) (P-App. 56-57)

CONCLUSION

The Court of Appeals decision in this case is consistent with the precedents of this Court and the Courts of Appeals and in no way departs from the accepted and usual course of judicial proceedings.

The Court of Appeals decision in no way conflicts with the applicable

decisions of this Court and does not involve an unresolved question of federal law which requires the review of this Honorable Court. Accordingly, respondents respectfully request the Court to deny Petitioner's Writ of Certiorari.

TOM P. MONTEVERDE
JEAN C. HEMPHILL
Attorneys For Respondents,
Daniel Boyer and Boenning
& Scattergood, Inc.

OF COUNSEL:

MONTEVERDE, HEMPHILL, MASCHMEYER & OBERT
Suite 2230, The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109-1022
(215) 735-1900